



# *The Public Service Commission State of South Carolina*

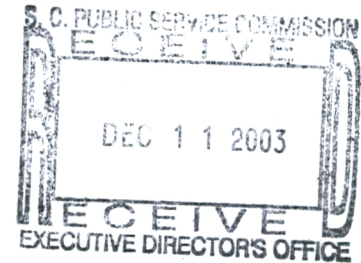
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December 11, 2003

Honorable Bruce F. Duke  
Deputy Executive Director  
Public Service Commission of  
South Carolina  
P. O. Drawer 11649  
Columbia, S.C. 29211



RE: Docket No. 2003-77-C – Application of BellSouth Public Communications,  
Inc. for Approval to Divest Itself of Its Assets

Dear Mr. Duke:

Enclosed for filing, please find an original and ten (10) copies of the Mediator's Report of the Commission Staff in the above-captioned Docket. By copy of this letter, I certify that all parties of record have been served with copies of this Report.

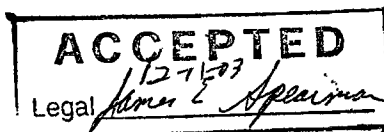
Thank you for your consideration in this matter.

Sincerely,

F. David Butler  
General Counsel

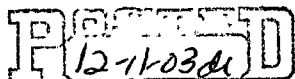
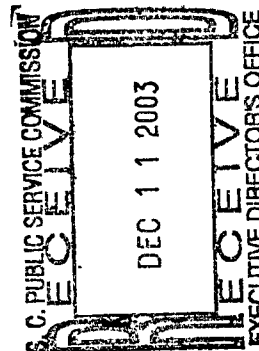
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cc: All Parties of Record

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**Mediator's Report in Docket No. 2003-77-C**

**Application of BellSouth Public Communications, Inc.**  
**For Approval to Divest Itself Of Its Assets**



**I. History**

On March 11, 2003, BellSouth Public Communications, Inc. (BSPC) filed an Application with the Commission for approval to divest itself of its assets in the course of exiting the payphone business. In that Application, BSPC asserted that it provides certain payphone services throughout South Carolina pursuant to certificates granted by the Commission, and that it intends to cease providing payphone services in the State of South Carolina (or in any other State) by late in the fourth quarter of 2003 or early in the first quarter of 2004. BSPC also noted that in preparation for its exit from the market, BSPC intends to divest itself of its assets, and BSPC therein requested Commission approval to do so in South Carolina, pursuant to S.C. Code Ann. Sections 58-9-300 and/or 58-9-310. BSPC finally noted that after it had ceased providing any payphone services in South Carolina, it intended to seek withdrawal of the certificates granted by the Commission by way of an appropriate filing.

On May 12, 2003, The Women's Shelter filed its Petition to Intervene and Motion to Hold Proceeding in Abeyance in this matter. Petitions to Intervene were later filed by the South Carolina Public Communications Association (SCPCA) and the Consumer Advocate for the State of South Carolina (the Consumer Advocate). The Consumer Advocate was allowed to intervene out of time with conditions.

The substance of The Women's Shelter's Petition to Intervene was that the Federal Communications Commission (FCC) delegated to this Commission its authority under Section 276 of the Communications Act of 1934, as amended at 47 U.S.C. Section 276(b)(2)(2001) to ensure that public interest payphones are supported fairly and equitably in South Carolina. Further, The Women's Shelter asserted that if the Commission grants BSPC's Application and allows BellSouth to exit the public payphone business, then no public payphone will be available to serve the Women's Shelter and that support for other public interest payphones located in South Carolina will be materially and adversely affected.

The Women's Shelter's Motion to Hold the Proceeding in Abeyance stated that BSPC and The Women's Shelter entered into a payphone location agreement on or about July 27, 1996 for the provision of payphone service. The payphone was to be used by The Women's Shelter's residents and other members of the public using the Shelter location. Under the terms of that contract, according to The Women's Shelter, BSPC agreed to provide and support a public payphone at the Shelter location. According to The Women's Shelter, that payphone is the only publicly available telephone accessible to the Shelter's residents.

The Women's Shelter's Motion further asserted that BSPC is the dominant provider of public payphones in the State of South Carolina, and that if the Commission grants BSPC's application for approval to divest itself of its payphone assets, and allows BSPC to discontinue its public payphone service without establishing a fair and equitable funding mechanism to compensate alternative payphone providers willing to replace the allegedly public interest payphones currently supported by BSPC, many public interest

payphones will cease to exist in South Carolina, and that the public health, safety and welfare of many South Carolina citizens would be adversely affected as a result. In summary, The Women's Shelter argues that to ensure the continued existence of these protected payphones as required by the Act, the Commission should evaluate the current state of public interest payphones and adopt rules necessary to establish a funding program before approving BSPC's Application to divest itself of its payphone assets.

On May 23, 2003, BSPC filed a Response to The Women's Shelter's Petition to Intervene and Motion to Hold Proceeding in Abeyance and also requested that the Commission deny The Women's Shelter's Petition and Motion. In summary, BSPC's position is that the relief sought by The Women's Shelter is prohibited by Federal law. According to BSPC, the FCC has adopted a regulation requiring State Commissions to remove any requirements that impose market entry or exit requirements on payphone service providers like BSPC. Although the States remain free to impose regulations on payphone service providers on a competitively neutral basis to provide consumers with information and price disclosure, according to BSPC, the States are required to remove "in particular, those rules that impose market entry or exit requirements." BSPC also argues that it is impermissible for The Women's Shelter to now ask this Commission to require BSPC to remain in a competitive market in which it no longer wishes to compete until it makes certain determinations with regard to public interest payphones.

In addition, BSPC asserts that The Women's Shelter has asked the Commission to initiate a proceeding to establish a public interest payphone program that will fairly and equitably fund support for such payphones. Although the Commission had initially determined that there is no need for a public interest payphone program in South

Carolina, BSPC notes that the Commission can revisit that determination. However, BSPC states that the Commission should do so, if at all, after BSPC has exited the market, to allow the market time to adjust to that exit. As BSPC notes, a “public interest payphone” is, by FCC definition, one that “(1) fulfills a public policy objective in health, safety, or public welfare, (2) is not provided for a location provider with an existing contract for the provision of a payphone, and (3) would not otherwise exist as a result of the operation of the competitive marketplace.” BSPC argues that the payphone at The Women’s Shelter is not actually a “public interest payphone” according to this definition, since said payphone is actually provided by contract between The Women’s Shelter and BSPC.

Lastly, BSPC states that its exit from the market will not impair the Commission’s ability to fund any public interest payphone program that it may decide to implement in a separate proceeding. Accordingly, BSPC requested that the Commission deny The Women’s Shelter’s Petition to Intervene and refrain from ruling on the Motion to Hold the Proceeding in Abeyance.

SCPCA’s Petition to Intervene, which did not oppose BSPC’s exit from the marketplace, stated that the Association’s members provide payphone service in South Carolina, and have an obvious interest in any public interest payphone proceeding that the Commission might initiate. Further, the Association states that its members may be similarly situated to BSPC with regard to their own decisions, if any, to exit the payphone business. Consequently, a Commission decision staying BSPC’s exit from the payphone business could set an adverse precedent with regard to SCPCA’s members, according to SCPCA’s Petition. Again, SCPCA did not oppose BSPC’s exit from the South Carolina

marketplace. SCPCA also filed a Response to The Women's Shelter's pleadings, arguing against the Women's Shelter's position in this matter.

On June 25, 2003, The Women's Shelter filed an additional document replying to BSPC's and the SCPCA's Responses to The Women's Shelter's Petition to Intervene and Motion to Hold Proceeding in Abeyance. Further, in accordance with Commission Regulation 103-820(B), the Women's Shelter requested that the Commission initiate an informal proceeding to resolve the matters raised by the parties. Also, on June 25, 2003, the Shelter requested that the Commission initiate a rulemaking to create a public interest payphone program in the State of South Carolina. The Shelter asserts that the rulemaking should address funding for public interest payphone providers and transition plans for providers that exit the market to ensure the continuity of public interest payphones that may be currently in existence.

Next, on July 3, 2003, BSPC moved for expedited oral argument and/or expedited rulings on the matters pending before the Commission. On July 14, 2003, The Women's Shelter filed its opposition to BSPC's Motion. On July 23, 2003, the Commission issued Order No. 2003-465, granting oral arguments to dispose of all pending matters after the discovery period in the case was concluded.

On July 24, 2003, BSPC filed a Motion for Designation of Mediator and Entry of Protective Order. The Women's Shelter replied to the Motion on August 1, 2003, and, on August 14, 2003, the Commission issued Order No. 2003-505, granting the Motion for Designation of a Mediator. Both BSPC and The Women's Shelter agreed on the appointment of a Mediator. Through its Order, the Commission held that General Counsel F. David Butler should be appointed mediator. Further, the scheduled oral

arguments on outstanding motions were cancelled. The parties were given the right to petition for a hearing on the basis that the mediation was unsuccessful, but said hearing was to be held no later than eight (8) weeks following the commencement of mediation. (It should be noted that as the result of successful mediation, no party to the case subsequently filed a petition for a hearing.) In addition, it was held that any proprietary information provided in the mediation should be usable by the Commission Staff and parties in subsequent proceedings regarding the matter of divestiture of payphones, or the creation of a public interest payphone program, provided that any such information submitted in such proceeding is submitted pursuant to a protective order.

On August 8, 2003, the Consumer Advocate filed a Petition to Intervene Out of Time. On August 18, BSPC filed a Response, opposing the Petition. The Commission issued Order No. 2003-512 on August 20, 2003, granting the Consumer Advocate's Petition, with participation limited to the subject of public interest payphones. The Consumer Advocate was also to be allowed to participate in the mediation process on the subject of public interest payphones.

## **II. Methodology**

Lengthy mediation sessions with all parties represented and the Mediator present and presiding were held on August 25, 2003 and September 8, 2003 in order to determine what issues existed in the case, and in order to begin resolution of said issues. All parties executed a confidentiality agreement consistent with the South Carolina Alternate Dispute Resolution Rules. Prior to the first mediation session on August 25, 2003, all parties were given the opportunity to submit proposed issues lists to the Commission-appointed mediator. Such lists were extremely helpful in delineating the issues, and were

discussed extensively during the first mediation session. It should be noted that prior to, between, and after the listed full mediation sessions, individual discussions were held between the Mediator and the various parties, and between the various parties themselves in order to attempt to resolve issues. Further, electronic mail and telephonic communication was used to facilitate communication and determine progress outside the mediation sessions among and between all participants in the process.

Subsequent to the full mediation sessions, all parties (except for the Consumer Advocate) agreed to the terms of a proposed Commission Protective Order, which would be used as a method to address various issues raised during the mediation process. On September 17, 2003, the Commission issued Order No. 2003-572, approving the proposed Protective Order. That Order described the willingness of BSPC to share confidential information concerning payphone locations with the other parties to this docket, for various limited purposes, as long as that information is protected by a Protective Order. This issue will be discussed more extensively in the full discussions of the issues in the case below.

### **III. Issues**

The issues to be examined in the case may be summarized as follows:

1) Whether BSPC should be allowed to exit the payphone market by the end of 2003, independent of any consideration of a “public interest payphone docket” by the Commission, or whether the exit of BSPC should be held in abeyance until the Commission implements a public interest payphone program and takes such other steps as may be necessary to ensure that public interest payphones are supported in the State.



2) Whether BSPC should provide to the parties and the Commission information that would be relevant to any public interest payphone inquiry that the Commission may decide to conduct.

3) Whether a regulatory scheme should be developed at this time under which BSPC can exit the payphone market in a reasonable time while ensuring that The Women's Shelter and other public interest payphone users continue to have access to reasonably priced payphone service.

4) Whether the immediate concerns can be resolved, and then a model considered in further proceedings before the Commission that addresses the overarching issue of public interest payphone support.

#### **IV. Discussion of Certain Legal Issues**

First, according to BSPC, Federal law is preemptive in this area. BSPC states a belief that the Federal law prohibits the Commission from imposing any exit requirements upon payphone service providers like BellSouth. This view is also shared by the SCPCA. In addition to filing a major memorandum on this issue, BSPC also cites a July decision of the DC Court of Appeals, *New England Pub. Communications Council, Inc. v. Fed. Communications Commission*, 334 F. 3d 69 (DC Cir. 2003) for the proposition that Section 276 of the Telecommunications Act of 1996 “unambiguously and straightforwardly authorizes the FCC to regulate the BOC’s intrastate payphone line rates...” The opinion further states that Congress specifically authorized the FCC to eliminate barriers to competition. BSPC argues that the relief requested by The Women’s Shelter, i.e. to hold BSPC’s exit from the public payphone market in abeyance is therefore prohibited by Federal law.

A second view, which is shared by both BSPC and the SCPCA, is that until BellSouth leaves the marketplace, it will be impossible to determine if the payphone at The Women's Shelter is a "public interest payphone." The stated reason for this is that until BSPC leaves the marketplace, it will be impossible to determine if another provider will enter into a contract for that location or if that payphone would not otherwise exist as a result of the operation of the competitive marketplace. A "public interest payphone, according to the Payphone Order at Paragraph 282 is "one that fulfills a public objective in health, safety, or public welfare, is not provided for a location provider with an existing contract for the provision of a payphone, and would not otherwise exist as a result of the operation of the competitive marketplace."

#### **V. Resolution of Issues**

Without conceding any of the legal or factual points listed above, and without formalizing a final written agreement, the parties have done the following to attempt to resolve all disputed issues:

1. Pursuant to Commission subpoenas, The Women's Shelter and SCPCA have received detailed information on the location of present BSPC payphone sites. The Women's Shelter received the information subsequent to its letter request for a Commission subpoena dated October 31, 2003, and the subsequent issuance of a subpoena. The SCPCA received the information subsequent to its letter request for a subpoena dated November 4, 2003, and the subsequent issuance of a subpoena. Further, BSPC has agreed to respond to a Commission subpoena issued after a letter request by the Commission Staff for a subpoena for the same information that will be placed under

seal pursuant to the protective order for use before the Commission in any future public interest payphone dockets that may be established by the Commission.

2. The Women's Shelter has moved to withdraw its pleadings in this Proceeding.

3. BSPC has filed two documents. The first is a letter of support to The Women's Shelter's proposal to initiate a separate and distinct proceeding to consider issues related to public interest payphones. The second BSPC document is a letter advising the Commission that it supports the creation of a separate and distinct docket and proceeding to review and consider issues related to public interest payphones of the Women's Shelter Petition for Rulemaking.

4. SCPCA has advised the Mediator that it is prepared to immediately withdraw its Petition to Intervene, contingent on the Commission's approval of The Women's Shelter's Motion to Withdraw its Pleadings.

5. The Consumer Advocate has sent electronic mail indicating that he has no objection to any action that the Commission might take in this docket, as long as public interest payphones are not considered in this docket.

6. BSPC has filed a Motion for Expedited Review along with verified testimony to support its original Petition to transfer its assets and thus leave the market without qualification.

## VI. Recommendations of the Mediator

The Mediator hereby makes the following recommendations to the Commission in this matter:

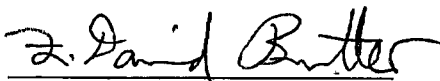
1) The Commission should grant The Women's Shelter's motion to withdraw its pleadings.

2) The Commission should consider the separate establishment of a public interest payphone docket, which is separate and distinct from this docket.

3) The Commission should grant the SCPCA's Motion to Withdraw.

4) The Commission should grant BSPP's Motion for Expedited Review, based on the verified testimony submitted, and should proceed to award the relief sought by BellSouth in its original Petition in this Docket.

Respectfully submitted,



F. David Butler  
Mediator

December 11, 2003  
Columbia, South Carolina



# *The Public Service Commission* *State of South Carolina*

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December 11, 2003

IN RE: DOCKET NO. 2003-77-C – BELLSOUTH PUBLIC COMMUNICATIONS, INC. –  
APPLICATION FOR APPROVAL TO DIVEST ITSELF OF ITS PAYPHONE ASSETS

COPY OF MEDIATOR'S REPORT OF THE COMMISSION STAFF WAS SENT  
FIRST-CLASS POSTAGE AFFIXED TO THE FOLLOWING:

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